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BEING

REPORTS OF MALAYSIAN AND SINGAPORE CASES DETERMINED IN THE HIGH COURTS, THE FEDERAL COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF CRIMINAL APPEAL OF SINGAPORE, AND THE PRIVY COUNCIL.


## SINGAPORE REPORT

### SIM HONG BOON v. LOIS JOAN SIM

[C.A. (Wee Chong Jin C.J., Winslow & Kulasekaram JJ.)
November 24, 1972]

[Singapore — Civil Appeal No. 31 of 1972]

*Family Law — Children — Custody — Jurisdiction — Child out of jurisdiction — Whether court has jurisdiction to entertain application for custody.*

The appellant in the court below commenced an action against the respondent, his wife, for divorce. With regard to a prayer in the petition for custody of the child of the marriage, the learned judge after hearing the evidence declined to make an order in favour of the appellant on the ground that "the child in question is out of the jurisdiction of this court and I am not disposed to making an order which I cannot enforce".

The facts were that the parties were married in March 1965, the husband being a Singapore citizen and the wife an Australian citizen. In December 1967, a son, the child in question was born. Sometime after the child's birth and before March 1969 the wife had an association with someone in Singapore which was objected to by the husband and the marriage thereupon appeared to head towards a possible break down. In March 1969 the husband in the course of his professional activities as an architect left Singapore for Europe and in the hope of the marriage being kept a happy one, the husband agreed to the wife's taking a holiday in Australia and taking with her the son. Since she left for Australia with the child she had never returned to Singapore nor had the son come back to Singapore. On the evidence the wife when she left Singapore had no intention of keeping the marriage intact nor to return to Singapore back to the matrimonial home and bring the son back with her.

**Held:** (1) if there are special circumstances, where the parties are before the court in the sense that they have submitted to the jurisdiction of the court, even though the subject matter of the application the child of the marriage is not before the court, the court has jurisdiction and the court would not assume that any order which it makes relating to the child cannot be enforced, and the court would consider that once the parties have submitted to the jurisdiction of the court, the court is not to assume that the party against whom the order has been made would disobey any order that may be made:

(2) in the case of a male infant a consideration of the fact that a mother is in a better position to bring up a child is different from the case of a female infant. It is not the immediate readjustment that need to take place but throughout the entire period until that child becomes an adult, that ought to be considered.

COURT OF APPEAL.

*J. Grimberg* for the appellant.

*Henry Hangchi* for the respondent.

**Wee Chong Jin C.J.** (delivering oral judgment of the court): This action was commenced by the appellant against the respondent, his wife, and the co-respondent. With regard to a prayer in the petition for custody of the child of the marriage, Mr. Justice D'Cotta after hearing the evidence of the petitioner, the appellant in the present proceedings, declined to make any order in favour of the appellant for the custody of the child of the marriage.

The facts are that the parties were married in March 1965, the husband being a Singapore citizen of Chinese origin and the wife an Australian citizen. The husband was educated and obtained a professional qualification as an architect in Australia where he met and married his wife. Two months later the married couple came to Singapore and the matrimonial home was set up here. In December 1967 a son, the subject matter of the present custody application, was born. On the evidence, sometime after the child was born and before March 1969 the wife had an association with someone in Singapore which was objected to by the husband and the parties thereupon or the marriage thereupon appeared to head towards a possible break down. In March 1969, the husband in the course of his professional activities left Singapore for Europe and in the hope of the marriage being kept a happy one, the husband agreed at the suggestion of the wife for her to take a holiday in Australia for three months and to take with her the son of the marriage. Since the wife left Singapore in March 1969 with the child she has never returned to Singapore nor has the son come back to Singapore. It seems to be a fair inference on the evidence that the wife when she left Singapore had no intention of keeping the marriage intact and at any rate had no intention of returning to Singapore back to the matrimonial home and bring the son back with her. The appellant, the father, went to Australia, Perth, in April 1970 and in spite of the fact that by then he had discovered that the wife was associating with the co-respondent, he tried to salvage the marriage and to persuade the wife to return to Singapore back to the matrimonial home.

Before the appellant returned to Australia in September 1969 the wife had commenced or had taken up proceedings by way of originating summons in the Supreme Court of Western Australia seeking an order for custody of the child and in that application the Supreme Court of Western Australia made an interim

order for the custody of the child as well as an injunction to restrain the appellant from removing or attempting to remove the child from the custody of the mother. In May 1970 apparently the originating summons was restored before the Western Australia Supreme Court and it was adjourned *sine die* for the purpose of giving the husband the opportunity to take proceedings for dissolution of the marriage and for custody in a court of his domicile *i.e.* in Singapore. It is thus clear that the Western Australia court declined to proceed to decide the wife's application for custody until after the husband's contemplated proceedings in the courts in Singapore for dissolution of the marriage and for custody of the child of the marriage had been heard and disposed of in our courts.

In June 1970 the husband filed divorce proceedings in Singapore naming as co-respondent the person whom he had discovered had an adulterous relationship with the wife while she was in Perth. The petition was heard in April 1971. It was an undefended petition and after hearing the petitioner, the husband, Mr. Justice D'Cotta made an order *nisi* in favour of the husband and adjourned the custody prayer as well as the claim for damages against the co-respondent for it to be disposed of later.

In June 1971 the application for custody and for damages was restored and although the respondent and co-respondent were represented by solicitors on their behalf they were not present in spite of an offer by the husband to pay for the expenses of the wife and the co-respondent to enable them to be present and to appear and give evidence if they desire before the High Court in Singapore. That offer which included an offer to pay the air passage of the child, the son of the marriage, was declined. After hearing the evidence of the husband, Mr. Justice D'Cotta as we have stated declined to make an order granting custody of the son of the marriage to the petitioner and decreed the amount of damages to be paid by the co-respondent. In his oral judgment at the conclusion of the custody hearing the judge said: —

"The child in question is out of the jurisdiction of this court and I am not disposed to making an order which I cannot enforce".

Now it is common ground that when considering the question of custody the first and paramount consideration is the welfare and interest of the infant in question. It is also common ground that the High Court has jurisdiction to entertain an application for custody and to make an order for custody in respect of a child of the marriage even though that child is out of the jurisdiction of the court and even though the respondent in such an application is out of the jurisdiction of the court. It is also common ground that in such circumstances it is rare or exceptional or highly unusual for a court to make a custody order in respect of a child who is out of the jurisdiction but it is also common ground that in special circumstances or in exceptional cases the courts can and will make such custody orders. The trial judge in his oral judgment said and we quote: —

"I would have no hesitation in granting custody of the child to the petitioner for in doing so I am sure that the child will get all the love, care and affection which he needs at this stage of life; his future will be mapped out for him and the education which he will receive in Singapore which will include learning the ways, customs and cultures of the various races that inhabit this Island will stand him in good stead when he attains manhood. It would appear that the child now has a seemingly bleak future and if the welfare of the child is the paramount consideration which, in my opinion, it is, I sincerely trust that those concerned will see the light of day and give the petitioner the custody of the child".

It does appear to us that the trial judge on the merits, so to speak, of the custody application clearly held the view that in the circumstances of the particular matter before him, the paramount consideration namely the welfare of the child lies with his being in the custody of the father and not of the mother. We are also decidedly of the same opinion and the only question that we have now to consider is whether we ought, in spite of the trial judge's decision, to make an order granting the custody of the son of the marriage to the appellant, the husband. It seems to us that the trial judge erred first in treating the principle to be that in the proper exercise of his discretion an order should not be made which cannot be enforced. The true principle seems to us to be that if there are special circumstances and where the parties are before the court in the sense that they have submitted to the jurisdiction of the court, even though the subject matter of the application the child of the marriage is not before the court, that the court has jurisdiction and the court would not assume that any order which it makes relating to the child cannot be enforced, and the court should consider that once the parties have submitted to the jurisdiction of the court, the court is not to assume that the party against whom the order has been made would disobey any order that may be made. On the facts of this particular case that assumption in our opinion ought to be made because in the first place the respondent herself has applied before a court of law albeit in Australia for the court to decide as to who should have custody of the child as between her and her husband and in the second place she has submitted to the jurisdiction of the High Court here and it must be assumed that she would abide by any order that may be made.

Now there are many factors which, in our view, bring this application within one of those rare or unusual or exceptional instances where an order of custody should be made even though the child is out of the jurisdiction of the court. It seems to us that the trial judge in refusing to make the order failed to take into consideration what is an important factor, the fact that the Supreme Court of Western Australia had expressly declined to adjudicate on the very same question before Mr. Justice D'Cotta namely the custody of the child, until the High Court in Singapore had considered a precisely similar application. It is said that as the paramount consideration is the welfare of the child it would not be in the child's welfare for him after a lapse of 2½ years from March 1969 till now and during which years the child has become accustomed to a way of life different from a way of life here, to uproot him and separate him from his mother to take up life in totally different surroundings and circumstances. While that is a strong factor, a factor which the court must consider, it is equally clear, we think, that in the case of a male infant, at any rate a

consideration of the fact that a mother is in a better position to bring up a child is different from the case of a female infant. In any event it is not the immediate readjustment that must necessarily have to take place but in our view throughout the entire period until that child becomes capable of looking after himself, in other words becomes an adult, that ought to be considered.

Having regard to all these considerations we will make an order granting custody of this child of the marriage to the appellant, the petitioner in the divorce proceedings with liberty to apply and also order that if and when the respondent abides by this order and hands over the custody of the child to the husband the petitioner that she should have reasonable access and if the parties cannot agree as to the terms of access there will be liberty to apply to the Registrar in relation to that order.

As the appellant is not seeking costs, there will be no order as to costs and the deposit to be paid out to the appellant's solicitors.

*Order accordingly.*

Solicitors: *Drew & Napier; Hangchi, Lee & Woo.*

# MALAYSIAN REPORTS

## YEAP YOK TEE v. LEE BOON BEE

**[A.C.J. (Ibrahim J.) March 4, 1972]**

**[Kota Bharu — Civil Appeal No. 22 of 1971]**

*Land Laws — House built on land — Whether part of the land — Tenancy — Registered interest subject to tenancy — National Land Code, ss. 5 and 213(5).*

This was an appeal against the decision of the learned president who had dismissed the appellant's claim for vacant possession of certain premises. The facts were that the land had been transferred to the appellant. A house had been built on the land and this was occupied by the respondent who had been paying rent for the said premises.

**Held:** (1) the house formed part of the land on which it stood and was therefore the property of the appellant,

(2) the appellant's registered interest in the land was subject to the tenancy and as the respondent was a lawful tenant of the house the appellant could not succeed in her claim.

*Cases referred to:-*

(1) *Chua Sai Ngoh* v. *Beh Ai Meng* [1955] M.L.J. 167.

(2) *Haji Mohamed Dom* v. *Sakiman* [1956] M.L.J. 45.

(3) *Bajaj Textiles Ltd.* v. *Gian Singh & Co. Ltd.* [1971] 2 M.L.J. 133.

(4) *Eusop Ali and another* v. *Nyonya Lee Gaik Hooi* [1953] M.L.J. 98.

(5) *Devi* v. *Francis* [1969] 2 M.L.J. 169.

CIVIL APPEAL.

*H. L. Wrigglesworth* for the appellant.

*A. Wilson* for the respondent.

**Ibrahim J.:** This is an appeal against the decision of the learned president who dismissed with costs the appellant/plaintiff's claim for vacant possession of premises No. 17 Jalan Pauh, Tanah Merah, and damages for alleged unlawful occupation thereof.

The material facts were not in dispute. The land on which the said premises stood was a Malay Reservation land and at one time belonged to Koh Geok Chin who agreed to sell it to Fong Yew Chit and on the strength of that agreement Fong Yew Chit built the said premises. The approval of His Highness the Ruler in Council was however not obtained and as a result of that Koh Geok Chin allowed Fong Yew Chit to keep the said premises on the land on payment of ground rent of $60 per annum. Fong Yew Chit subsequently gave the said premises to his son Fong Eng Leong (DW2) who continued to pay the ground rents to the original and subsequent owners of the land. The land was transferred to various persons and on 2nd September 1969 it was transferred from Ong Hau Tong to the appellant/plaintiff. Before that Ong Hau Tong and the appellant/plaintiff had on 2nd November 1965 entered into an agreement (P2) by which Ong Hau Tong agreed to transfer the land to the appellant/plaintiff. The appellant/plaintiff admitted that she knew that when P2 was made the said premises did not belong to Ong Hau Tong and that the price of $7,000 was only for the land and did not include the said premises. She also admitted that the respondent/defendant was paying rent for the said premises to DW2 which was at $50 p.m. On the execution of P2 the